The question:

The *Silala Waters* dispute before the ICJ and the law on the use of international rivers for non-navigational purposes

Introduced by Lucas Carlos Lima

On the 6th June 2016 Chile brought a new dispute with its neighbour, Bolivia, to the International Court of Justice (ICJ), this time concerning transboundary water resources. The present *querella* regards the *Status and Use of the Waters of the Silala*, a water basin whose main course rises in Bolivia, flows downstream crossing the border between the two countries and disembogues into the San Pedro de Inacaliri river, in Chile. In a nutshell, the two States disagree on questions of fact and law in relation to those waters. On the one hand, Chile claims that the Silala waters constitute an international watercourse, thus advocating an equitable and reasonable use of those waters anchored in customary international law. On the other hand, Bolivia maintains that the water basin originates completely in its territory and that it was unduly diverted by Chile, leading to its assertion of total control over it.[1]

Although this is not the first dispute involving the two countries before the ICJ[2] nor the first dispute between Latin American States involving water resources,[3] the innovative feature of this one lies in the prominent role to be played by the law on the use of international rivers for *non-navigational* purposes, a subject that is mainly governed by customary international law and by the UN Convention on the Law of the Non-Navigational Uses of International Watercourses (which entered into

[1] For a broader picture of the dispute, see the Republic of Chile application on the *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* available at <www.icj-cij.org/docket/files/162/19020.pdf>.

[2] See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* <www.icj-cij.org/docket/index.php?p1=3&p2=1&code=bch&case=153&k=f3>.

[3] One may refer to the following cases: *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*.

force in 2014). However, none of the litigant States are parties to the Convention. This circumstance raises the question of the customary character of the provisions of the Convention. Difficulties may arise in this regard, especially if one considers that in the recent past the Court has refrained from approaching the question of 'whether and to what extent there exists, in customary international law, a régime applicable to navigation on "international rivers"'.[4] Even if the latter statement was expressly confined to navigational issues, it can be assumed that the existence of such a customary regime is open to debate in the present international legal system for non-navigational uses of international watercourses as well.[5]

If the dispute does not find an early conclusion, the counter-Memorial for Bolivia is expected by July 2018. While waiting for the unfolding of the procedure, which may also involve sensitive issues in relation to fact-finding, QIL has invited two young scholars with expertise in international water law to shed light on some aspects of the *Waters of Silala* dispute and on how the law on the use of international rivers for non-navigational purposes might be affected by its outcome.

In the first contribution, Tamar Meshel approaches the problem of what types of watercourses international watercourse law applies to. Since the definition of a watercourse in the language of Article 2(a) of the Convention does not mention the word 'natural' (whereas 'factors of a natural character' are required to be taken into account for the use of watercourse in 'an equitable and reasonable manner'), one might reasonably wonder whether this absence may have an impact on the applicabil-

[4] *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment of 13 July 2009 [2009] ICJ Rep 233, para. 34: 'The Court does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on "international rivers", either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of "international rivers", as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua'.

[5] Just by way of example, Judge *ad hoc* Guillaume held the view that 'customary international law offers no definition of "international rivers" and no régime governing navigation on such rivers.' (*Navigational and Related Rights (Costa Rica v Nicaragua)* Judgment of 13 July 2009, Declaration of Judge Gilbert Guillaume [2009] ICJ Rep 290, para 3).

ity of the Convention rules to other types of watercourses, such as artificial watercourses, diverted watercourses or channels. These and other related questions are dealt with in Tamar's contribution, whose main aim is to provide a general overview of current and historical requirements, as generally accepted by states and international bodies, for the application of international watercourse law.

The second contribution, written by Roberta Greco, from a different perspective, explores the potential consequences, from the viewpoint of the rights and obligations to States, of including a watercourse in the category of 'international watercourse'. While Article 5 of the UN Convention prescribes that '[w]atercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner', one might enquire as to what role is played by the doctrine of absolute sovereignty over water resources in the present international law.

The two contributions enrich the debates both on the exact definition of an international watercourse and on customary rights and obligations regarding water resources. They not only sketch a good picture of some of the relevant unclosed questions of international water law but also offer an interesting insight on the issues at stake in the Silala dispute. Assuming that the Court will address those issues, it remains to be seen whether the decision will swim up or downstream in the process of consolidation of that branch of international law.